No. 88-385

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OFELIA RODRIGUEZ DE QUIJAS, *et al.*,

Petitioners,

—v.—

SHEARSON/AMERICAN EXPRESS, INC.,
its successors and assigns,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JAMES K. MANNING
Counsel of record; and
PAUL WINDELS III
BROWN & WOOD
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for Securities Industry Association, D.A. Davidson & Co., Inc., Dain Bosworth Incorporated, Dean Witter Reynolds Inc., Goldman, Sachs & Co., J. C. Bradford & Co., J.J.B. Hilliard, W.L. Lyons, Inc., Johnston Lemon & Co. Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Piper, Jaffray & Hopwood Inc., The Advest Group, Inc., and Wheat, First Securities, Inc., as *Amici Curiae*

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Petitioners,

—v.—

SHEARSON/AMERICAN EXPRESS, INC.,
its successors and assigns,

Respondents.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT

The Securities Industry Association ("SIA"), D.A. Davidson & Co., Inc. ("D.A. Davidson"), Dain Bosworth Incorporated ("Dain Bosworth"), Dean Witter Reynolds Inc. ("Dean Witter"), Goldman, Sachs & Co. ("Goldman"), J.C. Bradford & Co. ("J.C. Bradford"), J.J.B. Hilliard, W.L. Lyons, Inc. ("Hilliard Lyons"), Johnston, Lemon & Co. Inc. ("Johnston Lemon"), Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), Piper, Jaffray & Hopwood Inc. ("Piper Jaffray"), The Advest Group, Inc. ("Advest"), and Wheat, First Securities, Inc. ("Wheat First"), submit this brief as *amici curiae* in support of respondents, and urge this Court to affirm the opinion and judgment of the United States Court of Appeals for the Fifth Circuit below in *Rodriguez de Quijas* v. *Shearson/Lehman Brothers*, 845 F.2d 1296 (5th Cir. 1988). The consents of petitioner Ofelia Rodriguez de Quijas and of

respondent Shearson/American Express, Inc., have been obtained and the originals thereof have been filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

SIA is the principal trade association of the securities industry, having as members more than five hundred and fifty securities firms in the United States and Canada. As such, it has a substantial interest in the extent to which agreements to arbitrate claims between securities firms and their customers may be enforced. Because arbitration is an efficient, fair, and economical manner of resolving disputes, most of SIA's members have agreed with many of their customers to arbitrate any controversies arising between them. Among these members are *amici* Advest, D.A. Davidson, Dain Bosworth, Dean Witter, Goldman, Hilliard Lyons, J.C. Bradford, Johnston Lemon, Merrill Lynch, Piper Jaffray, and Wheat First.

Certain *amici* are parties to cases pending in the lower federal courts that involve the issue presented on this petition. The procedural outcome of those actions will be affected by any decision taken by this Court on this petition. *Amici* therefore have a substantial interest in seeing this Court resolve whether agreements to arbitrate claims arising under Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) (the "Securities Act"), are enforceable as valid contracts under Section 2 of the United States Arbitration Act, 9 U.S.C. § 2 (the "Arbitration Act"), as is the case with claims arising under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (the "Exchange Act"). *Amici* seek to clarify and make uniform the law on this issue so that the enforceability of arbitration provisions in agreements with their customers can be predicted and relied upon. SIA and certain *amici* also filed briefs *amicus curiae* with this Court on the enforceability of agreements to arbitrate Exchange Act claims in *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985), and in *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987), and moved for leave to file a brief with respect to a petition raising the identical issue in *Dain Bosworth Incorporated* v. *Johnson*, No. 88-284.

SUMMARY OF ARGUMENT

The issue before the Court is whether predispute agreements to arbitrate claims arising under Section 12(2) of the Securities Act, 15 U.S.C. § 77*l*(2) are enforceable. In *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987), the Court held that agreements to arbitrate claims under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), were enforceable under the Arbitration Act.

McMahon rejected an argument based on *Wilko* v. *Swan*, 346 U.S. 427 (1953), that a predispute agreement to arbitrate securities claims waives substantive rights under the federal securities laws. *Wilko* held that an agreement to arbitrate Section 12(2) claims waives substantive rights bestowed by the Securities Act and that Section 14 of the Act, 15 U.S.C. § 77n, which voids any waiver of compliance with that Act, therefore voids such agreements to arbitrate. Yet the Court subsequently held in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), that, by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute under which the claim arose. Following *Mitsubishi*, the Court in *McMahon* found that arbitration as practiced in the securities industry today offers a fair and efficient means of resolving disputes and that an agreement to arbitrate securities disputes does *not* waive substantive rights under the Exchange Act. *McMahon* thus disavowed both *Wilko*'s general hostility to the arbitration process and its specific reasoning.

In light of *McMahon*, the United States Court of Appeals for the Fifth Circuit below held that predispute agreements to arbitrate Section 12(2) claims are enforceable under the Arbitration Act. *Rodriguez de Quijas* v. *Shearson/Lehman Brothers*, 845 F.2d 1296 (5th Cir. 1988). Because *McMahon* rejected the analytical predicate of the decision in *Wilko*—that an agreement to

arbitrate waives substantive rights—the Fifth Circuit interpreted *McMahon* as having effectively overruled *Wilko* and therefore did not feel constrained to follow *Wilko*.

The Fifth Circuit below correctly recognized *Wilko*'s "obsolescence" in light of the *McMahon* decision. *Wilko* reflects the suspicion courts once held of the arbitral process, as opposed to the congressionally enacted federal policy recognizing arbitration as an efficient means of resolving disputes. *See Shearson/American Express, Inc.* v. *McMahon*, 107 S. Ct. at 2340; *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*; *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983). *Wilko* did not apply the correct standard for determining whether Section 12(2) repealed the Arbitration Act by implication, a standard this Court has reiterated in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), and *Morton* v. *Mancari*, 417 U.S. 535 (1974). Rather than searching for statutory language in the Securities Act conflicting with the Arbitration Act or legislative history indicating congressional intent to repeal the Arbitration Act, *Wilko* overruled the substantive, congressional policies embodied in the Arbitration Act solely on the basis of its own conception of public policy.

Amici respectfully submit that, given the fairness and efficiency of arbitration in the securities industry, as found in *McMahon*, the Court should have no hesitation in holding a predispute agreement to arbitrate Section 12(2) claims as enforceable as any other contract. That result would make the law uniform for all agreements to arbitrate securities claims and conform to the well settled rule as to the enforceability of arbitration agreements in general. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*

POINT I

THE UNITED STATES ARBITRATION ACT MANDATES THAT ARBITRATION BE RECOGNIZED AS AN EFFICIENT AND WIDELY ACCEPTED MEANS OF RESOLVING BROKER-CUSTOMER DISPUTES IN THE SECURITIES INDUSTRY

The United States Arbitration Act provides that an agreement to arbitrate in a contract involving interstate commerce is valid to the same extent as any other contract. When Congress passed the Arbitration Act in 1925, it established a clear federal policy favoring the use of arbitration to resolve disputes. That policy marked a decisive shift from the hostility to arbitration then prevalent in the courts.

In its recent decisions, this Court has found occasion to recognize the policy behind the Arbitration Act. In *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, the Court observed:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.

473 U.S. at 626-27. *Accord Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. at 24 (the Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration . . . [and] questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); *Southland Corp.* v. *Keating*, 465 U.S. at 10 (in passing the Arbitration Act, "Congress declared a national policy favoring arbitration . . . [that] mandated the enforcement of arbitration agreements"); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974); *see also Wilko* v. *Swan*, 346 U.S. at 439 Frankfurter, J., dissenting) ("[t]here is nothing in the record . . . to indicated that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled").

Since this Court has decisively abandoned both the analytical reasoning and the deep suspicion of arbitration that permeates the opinion in *Wilko* v. *Swan*, there is no reason that *Wilko* should hold sway even in the narrow space to which it is now restricted. *Wilko* is premised on a fundamental hostility to arbitration. *See Shearson/American Express, Inc.* v. *McMahon*, 107 S. Ct. at 2340. Proceeding from that premise, *Wilko* espoused the theory that an agreement to arbitrate Securities Act controversies waives substantive rights under that statute. Because Section 14 of the Securities Act, 15 U.S.C. § 77n, invalidates "any . . . stipulation . . . to waive compliance with any provision" of the Securities Act, and because the Court doubted that arbitration panels would adequately enforce compliance with that Act, it therefore found predispute agreements to arbitrate Section 12(2) claims void.[1]

The decision in *Wilko* flatly ignored the substantive federal policy embodied in the Arbitration Act. In equating an agreement to arbitrate Securities Act controversies with a waiver of compliance with that Act, *Wilko* put the blind eye to Congress's unmistakable mandate that arbitration was to be a respected method of resolving disputes and that there was no public policy against agreements to arbitrate.

As this Court has recognized, its recent decisions substantially differ from *Wilko*'s hostility to arbitration. For example, *McMahon* observed:

1 *Wilko*'s language shows extraordinary cynicism as to the competence of arbitration tribunals:

> [A Securities Act] case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must not only be determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact" . . . cannot be examined.

346 U.S. at 435-36.

> It is difficult to reconcile *Wilko*'s mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act.

107 S. Ct. at 2341. Moreover, this Court has twice rejected the predicate of the *Wilko* decision, the notion that an agreement to arbitrate controversies under a federal statute waives compliance with the provisions of that statute:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution to an arbitral, rather than judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628; *accord*, *Shearson/American Express, Inc.* v. *McMahon*, 107 S. Ct. at 2339.[2]

Not only did *McMahon* abandon *Wilko*'s reasoning, it reached the exact opposite holding: it held that an agreement to arbitrate claims arising under Section 10(b) of the Exchange Act was *not* a "stipulation . . . to waive compliance with" the Exchange Act, which is void under Section 29(a) of that Act, 15 U.S.C. § 78cc(a), whereas *Wilko* had held that such an agreement *was* a "stipulation . . . to waive compliance with" the

2 The fallacy in *Wilko*'s confusion between a forum selection clause and a waiver of substantive rights is manifested in *Johnson* v. *O'Brien*, 420 N.W.2d 264 (Minn. App. 1988), *review denied*, No. C9-97-1784 slip op. (Minn. May 18, 1988), *petition for cert. filed sub nom. Dain Bosworth Incorporated* v. *Johnson*, No. 88-246. The plaintiffs in *Johnson* brought suit in state court, foregoing any procedural safeguards offered by the federal courts. Because the Securities Act vests both the state and federal courts with jurisdiction to hear Securities Act claims, an agreement requiring that all Securities Act claims be brought in a particular state court would not waive compliance with the Securities Act under Section 14. Yet there is nothing that ensures that a state court will provide a more advantageous forum for Securities Act claims than arbitration. To the contrary, the stock exchanges' powers to compel the presence of registered persons at arbitrations, for example, can far exceed that of state courts. *See* note 16, *infra*, at 12.

Securities Act. Yet, although *McMahon* questioned *Wilko*'s continuing vitality ("indeed most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable"), it nonetheless cautioned that "*stare decisis* concerns may counsel against upsetting *Wilko*'s contrary conclusion under the Securities Act." 107 S. Ct. at 2341.

Wilko's inconsistency with the state of arbitration in the securities industry today not only explains but justifies this Court's reluctance to follow *Wilko*'s holding or its policy pronouncements. The established structure of arbitration in the securities industry refutes *Wilko*'s assumption that the enforcement of contracts to arbitrate securities disputes will dilute the protection of investors under the securities laws. Securities exchanges and the National Association of Securities Dealers, Inc. (the "N.A.S.D."), under the supervision of the Securities and Exchange Commission, provide arbitration facilities for disputes between member firms and their public customers.[3] The current procedures have evolved since 1872, when the New York Stock Exchange, Inc. (the "N.Y.S.E."), first conducted customer arbitrations. The N.A.S.D. has maintained arbitration facilities for more than forty years. The exchanges and the N.A.S.D. also have permanent arbitration staffs. Their rules and constitutions contain detailed codes of arbitration procedures.[4]

Moreover, the Securities and Exchange Commission has approved the implementation and operation of this arbitral system, *see* Exchange Act Release No. 16390 (S.E.C. Nov. 30,

3 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542 (Rule 602); N.A.S.D. Manual (CCH) ¶ 3701; 2 N.Y.S.E. Guide (CCH) ¶ 2600 (Rule 600); Uniform Code of Arbitration § 1, *reprinted in* Fifth Report of the Securities Industry Conference on Arbitration (April 1986).

4 *See, e.g.*, Constitution of the New York Stock Exchange, Inc., Art. VIII, 2 N.Y.S.E. Guide (CCH) ¶¶ 1351-1357; Rules 600-634 of the New York Stock Exchange, Inc., *id.* ¶¶ 2600-2634; Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., N.A.S.D. Manual (CCH) ¶¶ 3701-3743; Arbitration Rules of the American Stock Exchange, Inc., 2 Am. Stock Ex. Guide (CCH) ¶¶ 9540-9551J.

1979), 18 S.E.C. Docket 1197 (1979), and retains jurisdiction to monitor the fairness of arbitration proceedings. *See* Section 19 of the Exchange Act, 15 U.S.C. § 78s. As the Commission itself argued to this Court in *McMahon*, in a brief signed by its General Counsel and Solicitor:

> [T]he Commission has had the power to ensure that arbitration procedures prescribed by the SROs [Self-Regulatory Organizations] are adequate to enforce the rights of customers against brokerage firms that are members of SROs. In these circumstances, the suspicion of arbitration on which *Wilko* rested is inappropriate, and an agreement to arbitrate accordingly should not be deemed a waiver of rights under the Exchange Act.

Shearson/American Express, Inc. v. *McMahon*, No. 86-44, Brief of the Securities and Exchange Commission as *amicus curiae* at 13.

That the Securities Industry Conference on Arbitration ("SICA") and the Commission have worked together to add further improvements to SRO arbitration codes in the year following the *McMahon* decision proves that the Commission can and will exercise its oversight authority and that SROs will respond in a constructive manner. During the Summer of 1988, the Commission invited SICA and the stock exchanges to review and possibly revise their arbitration rules in certain respects. SICA and the stock exchanges considered the matter and drafted amendments to their arbitration rules, which they have filed with the Commission pursuant to Exchange Act Rule 19b-4, 17 C.F.R. § 240.19b-4.[5]

As changed, the rules would require that any arbitration clause in a broker-customer agreement be highlighted and in plain language. In addition, the arbitration clause must disclose to the customer that he is thereby foregoing a jury trial in any lawsuit against his broker and agreeing to limits on discovery

5 The N.Y.S.E.'s proposed rule changes, which are substantively identical with SICA's and were filed with the Commission on October 17, 1988, File No. SR-NYSE-88-29, are set forth as Appendix A to this brief.

and appellate review.[6] The contract must also disclose the presence of the arbitration clause immediately before the customer's signature line.[7] The proposed amendments further require that discovery requests be responded to within 30 days and provide for a prehearing conference before an arbitration panel to resolve discovery disputes.[8] Retired securities industry personnel (as well as professionals who do substantial business with securities firms) who serve as arbitrators may only serve as industry arbitrators, and all arbitrators must provide their employment history for the prior ten years to the parties.[9] Last, a record, either stenographic or taped, must be kept of all arbitration proceedings, and arbitration awards must state the issue involved, the amount claimed, and the amount actually awarded.[10]

The long established competence of securities industry arbitrators to adjudicate disputes should dispel any suspicion of the arbitral process in that industry. The stock exchanges and the N.A.S.D. keep permanent lists of arbitrators. These lists comprise senior securities industry personnel, attorneys, and other professionals from outside the industry, who are well versed in the field. *See, e.g.*, Panel of Arbitrators 1988-89, 1 Am. Stock Ex. Guide (CCH) 158-59; N.A.S.D. Manual (CCH) ¶ 3702. Most have previously served as arbitrators and are therefore well acquainted with arbitration procedures and customs. Thus, this Court's observation in *Mitsubishi* that "adaptability and access to expertise are hallmarks of arbitration," 473 U.S. at 633, hits the mark with respect to the securities industry. As this Court stated after reviewing the state of arbitration in the securities industry in *McMahon*, "Even if *Wilko*'s assumptions regarding arbitration were valid at the time *Wilko* was decided,

6 *See* Appendix A, Proposed N.Y.S.E. Rule 637(1), at A-19.

7 *See* Appendix A, Proposed N.Y.S.E. Rule 637(2), at A-19.

8 *See* Appendix A, Proposed Rule 619(a)(b)(2), (d) at A-12-13.

9 *See* Appendix A, Proposed N.Y.S.E. Rule 610, at A-6-7.

10 *See* Appendix A, Proposed N.Y.S.E. Rules 623 and 627, at A-15-16.

most certainly they do not hold true today. . . ." 107 S. Ct. at 2341.[11]

The arbitration rules of the N.A.S.D. and the various securities exchanges further ensure that arbitration practice in the securities industry will be efficient and impartial. For example, these rules require that panels of arbitrators include members of the securities industry and of the public.[12] They require a majority of "public" arbitrators (*i.e.*, unaffiliated with member firms) in disputes between public customers and member firms unless the customer requests otherwise.[13] Arbitrators are required to disclose any business affiliation with any parties before them, and may be disqualified for cause for even the

11 Far from considering themselves as the only tribunal capable of hearing securities disputes, the federal courts have recognized securities industry arbitrators as qualified to resolve those claims. Courts have long compelled arbitration of Exchange Act disputes between members of a securities exchange or the N.A.S.D. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332; *Axelrod & Co.* v. *Kordich, Victor & Neufeld*, 320 F. Supp. 193 (S.D.N.Y. 1970), *aff'd*, 451 F.2d 838 (2d Cir. 1971); *Brown* v. *Gilligan, Will & Co.*, 287 F. Supp. 766, 774-75 (S.D.N.Y. 1968). Claims under the Exchange Act are routinely arbitrated if the public customer chooses to arbitrate. *See Gardner* v. *Shearson, Hammill & Co.*, 433 F.2d 367 (5th Cir. 1970) (*per curiam*), *cert. denied*, 401 U.S. 978 (1971); *Moran* v. *Paine, Webber, Jackson & Curtis*, 389 F.2d 242 (3d Cir. 1968); *cf. AVC Nederland B.V.* v. *Atrium Inv. Partnership*, 740 F.2d 148 (2d Cir. 1984) (affirming the dismissal of an Exchange Act claim because the parties had agreed to try all disputes in the Netherlands).

12 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9541 (Rule 601); N.A.S.D. Manual (CCH) ¶ 3719; 2 N.Y.S.E. Guide (CCH) ¶ 2607 (Rule 607); Uniform Code of Arbitration § 8.

13 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542 (Rule 602); N.A.S.D. Manual (CCH) ¶ 3719; 2 N.Y.S.E. Guide (CCH) ¶ 2607 (Rule 607); Uniform Code of Arbitration § 8. As noted above at 9-10, the 1988 SICA proposed rule changes would set specific criteria for qualification as a "public" arbitrator. *See* Proposed N.Y.S.E. Rules 607, 608, 610 at A-4-7; N.Y.S.E. Guidelines for Classification of Arbitrators at A-20-21.

appearance of a conflict of interest.[14] Each party in an arbitration is accorded at least one peremptory challenge.[15]

The arbitration itself proceeds much like a trial. The parties have the right to be present at the hearing, to be represented by counsel, to cross-examine witnesses, and to take a transcript of the hearing. They may subpoena witnesses and documents just as in a court proceeding, and may also compel the presence of any employee of a member of the sponsoring institution at a hearing, regardless of whether that employee would be within the subpoena power of the courts of the state where the hearing is held.[16] Moreover, arbitrators serve, and witnesses testify, under oath.[17] The fairness of these rules and procedures is borne out by the results of arbitrations conducted under them. In 1987, 55% of public customer cases that went to arbitration before one of the securities exchanges or the N.A.S.D. and were decided—rather than settled—awarded damages to the customer.[18] A study prepared for the NYSE by the accounting firm of Deloitte Haskins & Sells ("DH&S") of arbitration and litigation results of customer public cases of six major brokerage firms suggests that arbitration may offer at least as favorable

14 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542(f) (Rule 602)(f); N.A.S.D. Manual (CCH) ¶ 3723; 2 N.Y.S.E. Guide (CCH) ¶ 2610 (Rule 610); Uniform Code of Arbitration § 11.

15 *See, e.g.*, Uniform Code of Arbitration § 10.

16 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶¶ 9546, 9548-49, 9551A (Rules 606, 608-09, 612); 2 N.Y.S.E. Guide (CCH) ¶¶ 2614-15, 2619-20, 2624 (Rules 614-15, 619-624); Uniform Code of Arbitration §§ 15-16, 20-21, 25.

17 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9551B (Rule 613); 2 N.Y.S.E. Guide (CCH) ¶ 2625 (Rule 625); Uniform Code of Arbitration § 26.

18 *See* Minutes of the June 24, 1988, Meeting of the Securities Industry Conference on Arbitration, which reported arbitration statistics for 1987 similar to those previously reported to the Securities and Exchange Commission. A table of these statistics, and of the 1986 statistics compiled by SICA, is set forth as Appendix A to the Brief of the Securities Industry Association as *amicus curiae* in support of the petition for a writ of *certiorari* herein.

results as litigation to public customers.[19] According to the DH&S survey, which reflects data from a three month period during 1987 and 1988, litigation plaintiffs recovered 2.6% of their original claims (including settlements), as opposed to 14.81% (including settlements) for arbitration claimants.[20]

Moreover, the arbitration process significantly reduces discovery expenses and minimizes delay in reaching a hearing. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628; C. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 Fordham L. Rev. 279, 286 (1984). For example, state laws generally provide subpoena power to arbitrators and counsel, and parties are encouraged to produce documents "to the fullest extent possible without resort to the issuance of the subpoena process."[21] Arbitrators may also direct the appearance of persons associated with member organizations or the production of records of these organizations without using the subpoena process.[22] That most stock exchanges and the N.A.S.D offer a streamlined arbitration procedure for smaller claims also enables customers to resolve small disputes without

19 The DH&S survey, which was annexed by the NYSE to its response to the Commission, and which was also filed with the United States District Court for the District of Massachusetts in *Securities Industry Association* v. *Connally*, Civil Action No. 88-2153-WD as an Exhibit to the Affidavit of Paul J. Dubow, sworn to November 28, 1988, and cited by the Court in its opinion granting summary judgment in favor of SIA, [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,107 at 91,217 (D. Mass. Dec. 18, 1988), is set forth as Appendix B to this brief.

20 *See* Appendix B at A-24.

21 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9548 (Rule 608); N.A.S.D. Manual (CCH) ¶ 3732; 2 N.Y.S.E. Guide (CCH) ¶ 2619 (Rule 619); Uniform Code of Arbitration § 20; C. Katsoris, *supra*, at 286. As noted above at 10, the proposed amendment to the SICA code would provide specific deadlines for responses to discovery requests, *see* Appendix A, Proposed N.Y.S.E. Rule 619(a)(b)(2), at A-12, and for discovery conferences, *see* Appendix A, Proposed N.Y.S.E. Rule 619(d), at A-13.

22 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9549 (Rule 609); N.A.S.D. Manual (CCH) ¶ 3733; 2 N.Y.S.E. Guide (CCH) ¶ 2620 (Rule 620); Uniform Code of Arbitration § 21.

incurring great expense.[23] Arbitration also offers an expeditious result. According to statistics compiled by SICA, 4,364 securities industry arbitrations were filed with securities exchanges and the N.A.S.D. in 1987, and 2,936 arbitrations in the securities industry were resolved during that year.[24] The 1987 figures represent more than three times the number of arbitrations filed in 1982.[25]

Finally, the excessive caseload in the federal district courts makes it all the more important that arbitrable claims between securities firms and their customers proceed to arbitration. Filings of securities and commodities claims increased to 2,844 in 1987.[26] Since the average caseload per United States District Judge in 1987 was 460 cases,[27] permitting agreements to arbitrate all securities laws claims would help to relieve the federal courts of their overloaded dockets and could effectively free as many as six federal district judges to handle other matters.

Wilko thus stands bereft of any factual, legal, or policy support. *Amici* respectfully submit that *Wilko*'s negation of congressional policy, its analytical inconsistency with this Court's

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23 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9551H (Rule 619); N.A.S.D. Manual (CCH) ¶ 3710; 2 N.Y.S.E. Guide (CCH) ¶ 2601 (Rule 601); Uniform Code of Arbitration § 2.

24 *See* Brief of the Securities Industry Association as *amicus curiae* in support of the petition for a writ of *certiorari* herein, Appendix A.

25 The number of filings rose from 1,340 in 1982 to 4,364 in 1987. *See* Fifth Report of the Securities Industry Conference on Arbitration Statistical Report (April 1986) (Exhibit A), which is reproduced in Appendix B to the Brief of the Securities Industry Association as *amicus curiae* in support of the petition for a writ of *certiorari* herein.

26 Annual Report of the Director of the Administrative Office of the United States Courts, Appendix I, Table C2 (1987). This table is reproduced in excerpted form as Appendix C to the Brief of the Securities Industry Association as *amicus curiae* in support of the petition for a writ of *certiorari* herein. These figures are calculated on the basis of a year beginning July 1; "1987" statistics therefore refer to the period July 1, 1986, through June 30, 1987.

27 Administrative Office of the United States Courts, Federal Court Management Statistics 1987 at 167.

more recent decisions, and its invalid factual assumptions take it out of the shelter of *stare decisis*. As the Court has long recognized, "*stare decisis*, in statutory construction, is a useful rule, not an inexorable command." *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring). Thus, the Court has overturned its own precedent in order to achieve consistency in interpreting statutory provisions. *See Commissioner* v. *Estate of Church*, 335 U.S. 632 (1949). The Court in *Church* reconsidered the construction of the "possession or enjoyment" clause under Section 811(c) of the Internal Revenue Code it had adopted in *May* v. *Heiner*, 281 U.S. 238 (1930). It did so because its subsequent decision in *Helvering* v. *Hallock*, 309 U.S. 106 (1940), had construed the same "possession or enjoyment" clause in Section 811(c) of the Code differently from *May*. *Church* found that the decision in *Hallock* amounted to a complete rejection of the rationale in *May*, even though it did not expressly overrule *May*. *Commissioner* v. *Estate of Church*, 335 U.S. at 643-45. While acknowledging the interests inherent in the doctrine of *stare decisis*, the Court overruled *May* in order to bring an inconsistent holding in line with its later decision. *See Commissioner* v. *Estate of Church*, 335 U.S. at 649-50. As stated in *Helvering* v. *Hallock*, where the Court was also confronted with incompatible decisions, the "real problem . . . is to determine whether we are to adhere to a harmonizing principle . . . or whether we are to multiply gossamer distinctions between the present cases and the . . . earlier ones." 309 U.S. at 118. Here, too, a holding that Section 12(2) claims are arbitrable would make the law with respect to those claims consistent with the law regarding Exchange Act claims.

Likewise, the Court has not hesitated to overrule decisions that "do not state the correct rule of law." *See Girouard* v. *United States*, 328 U.S. 61, 69 (1946) (overruling *United States* v. *Schwimmer*, 279 U.S. 644 (1929), *United States* v. *MacIntosh*, 283 U.S. 605 (1931), and *United States* v. *Bland*, 283 U.S. 636 (1931)). Here, again, where *Wilko*'s legal reasoning and policy consideration cannot pass muster under this Court's

more recent Arbitration Act decisions, *Wilko* cannot "state the correct rule of law" and should therefore be overruled.

Last, should the Court overrule *Wilko*, it will bestow the additional policy advantage of making the law uniform for all securities law claims. Parties will have no incentive to continue to plead a Section 12(2) claim as a means of avoiding arbitration.[28] The federal court system will therefore be spared substantial motion practice over pleading matters, as a well as over difficult collateral estoppel issues that invariably arise when claims arising under the same set of facts must be resolved by different tribunals.

POINT II

WILKO V. *SWAN* IGNORED THE STANDARD FOR FINDING AN IMPLIED REPEAL OF THE UNITED STATES ARBITRATION ACT

By holding that Section 12(2) claims are not arbitrable on the basis of its own perception of arbitration practice, *Wilko* usurped Congress's role in setting federal policy. Specifically, while purporting to resolve a conflict between "two policies, not easily reconcilable", 346 U.S. at 438, *Wilko* in fact manufactured that conflict on the basis of its hostility to arbitration. Notwithstanding Congress's policy favoring arbitration, *Wilko* equated an agreement to arbitrate Securities Act claims with a waiver of compliance with the Securities Act in order to void such an agreement under Section 14.

Wilko's analysis stands at odds with many of this Court's more recent rulings, in particular *McMahon* and *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc. Mitsubishi*

28 *Dain Bosworth Incorporated* v. *Johnson* appears to be a good example of this sort of practice. In *Johnson*, the plaintiffs originally brought a claim under the Minnesota Securities Act. When the defendants moved to compel arbitration, the plaintiffs amended their complaint to add a Section 12(2) claim and then again to delete their Minnesota Securities Act claim so that it could not be arbitrated. *See Dain Bosworth Incorporated* v. *Johnson*, No. 88-284, Petition for a Writ of *Certiorari* at 4-5, A-15-47.

requires that any finding of an implied repeal of the Arbitration Act be supported by "congressional intention expressed in some other statute . . . ." 473 U.S. at 627. This is simply a reiteration of the traditional standard for finding that a federal statute has been repealed by implication by a subsequently enacted federal statute. *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. at 88 (" 'repeals by implication [of a prior statue by a subsequently enacted one] are disfavored' ") (quoting *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980)); *Morton* v. *Mancari*, 417 U.S. at 550 ("In the absence of some affirmative showing of an intention [by Congress] to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable").

In *Mitsubishi*, this Court stated:

> We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

473 U.S. at 628[29]

Under this test, there can be no question that predispute agreements to arbitrate Section 12(2) claims are enforceable under the Arbitration Act. The Securities Act contains no statutory language that restricts a party's ability to choose an arbitral forum with respect to claims brought thereunder. Section 14, on which *Wilko* relied, concerns waivers of compliance with the Securities Act, not agreements as to what forum a claim under the Securities Act may be tried before. This Court has already marked this distinction in *Mitsubishi* and *McMahon* to the extent of holding that Section 29 of the Exchange Act, a nonwaiver provision substantially identical to Section 14, did not void agreements to arbitrate in *McMahon*.

29 The opinion in *Mitsubishi* cited *Wilko* v. *Swan* for this proposition, in spite of the fact that *Wilko* did not rely on text or legislative history, but rather on its hostile view of arbitration practice and its conception of an agreement to arbitrate statutory claims as a waiver of compliance with the statute in question, both of which notions *Mitsubishi* rejected in no uncertain terms.

Nor is there any evidence in the legislative history of the Securities Act that Congress intended to repeal the Arbitration Act with respect to Securities Act claims. That Congress in amending the securities laws in 1975 did not affirmatively overrule *Wilko* has no bearing on what Congress intended in 1933, the critical inquiry at bar. Likewise, although the Conference Report pertaining to those amendments observed that the amendments were not intended to change existing law as to waivers and then cited *Wilko* v. *Swan*, that language is not connected with any affirmative act of Congress, either in 1975 or in 1933, and hardly amounts to the direct legislation necessary to repeal the Arbitration Act in this context. *See* H.R. Conf. Rep. No. 94-229, at 111 (1975), *reprinted in* 1975 U.S. Code Cong. & Ad. News, at 179, 342. Indeed, the Court in *McMahon* found the language quoted from that Conference Report so obscure as not to be probative of anything, with the result that "the *Wilko* issue was left to the courts." 107 S. Ct. at 2343. Moreover, such subsequent legislative inaction will not prevent a Court from revisiting a decision that was ill-founded, as *amici* respectfully suggest is the case here. For example, in *Girouard* v. *United States*, the Court overruled its prior interpretation of a statute after Congress had rejected amendments to that statute that would have overruled the prior interpretation. *See* 328 U.S. at 72-76 (Stone, C.J., dissenting). As the majority held, "it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error." 328 U.S. at 69-70.

Absent specific legislative evidence to the contrary, the Arbitration Act must apply to Securities Act claims and agreements to arbitrate those claims must be honored as ordinary contracts.

CONCLUSION

For the reasons set forth above, *amici curiae* the Securities Industry Association, D.A. Davidson & Co., Inc., Dain Bosworth Incorporated, Dean Witter Reynolds Inc., Goldman, Sachs & Co., J.C. Bradford & Co., J.J.B. Hilliard, W.L. Lyons, Inc., Johnston Lemon & Co. Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Piper, Jaffray & Hopwood Inc., The Advest Group, Inc., and Wheat, First Securities, Inc., respectfully request that the decision of the United States Court of Appeals for the Fifth Circuit below be affirmed.

Dated: February 17, 1989

Respectfully submitted,

JAMES K. MANNING
Counsel of record; and
PAUL WINDELS III
BROWN & WOOD
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for *Amici Curiae*

Of Counsel:

William J. Fitzpatrick, Esq. Gerard J. Quinn, Esq.	SECURITIES INDUSTRY ASSOCIATION
Bruce A. MacKenzie, Esq.	D.A. DAVIDSON & CO., INCORPORATED
Louis L. Bulba, Esq.	DAIN BOSWORTH INCORPORATED
Paul J. Dubow, Esq.	DEAN WITTER REYNOLDS INC.
Robert Katz, Esq.	GOLDMAN, SACHS & CO.
R. Patrick Shepherd, Esq.	J.C. BRADFORD & CO.
James C. Stone III, Esq.	J.J.B. HILLIARD, W.L. LYONS, INC.
Gene E. Carasick, Esq.	JOHNSTON, LEMON & CO. INCORPORATED
Philip M. Mandel, Esq.	MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED
David Rosedahl, Esq.	PIPER, JAFFRAY & HOPWOOD INCORPORATED
Lee G. Kuckro, Esq.	THE ADVEST GROUP, INC.
William B. Lucas, Esq.	WHEAT, FIRST SECURITIES, INC.

APPENDIX A

PROPOSED AMENDMENTS TO THE ARBITRATION RULES OF THE NEW YORK STOCK EXCHANGE, INC., AS FILED WITH THE SECURITIES AND EXCHANGE COMMISSION ON OCTOBER 17, 1988, FILE NO. SR-NYSE-88-29

[ ] DELETED LANGUAGE
italics NEW LANGUAGE

Rule 601. SIMPLIFIED ARBITRATION

(a) Any dispute, claim or controversy, arising between a public customer(s) and an associated person or a member subject to arbitration under this Code involving a dollar amount not exceeding $10,000 exclusive of attendant costs and interest, shall upon demand of the customer(s) or, by written consent of the parties, be arbitrated as hereinafter provided.

(b) The Claimant shall file with the Director of Arbitration [one (1) executed Submission Agreement and one (1) copy of the Statement of Claim of the controversy in dispute,] *an executed Submission Agreement and a copy of the Statement of Claim of the controversy in dispute and the required deposit*, together with documents in support of the Claim. *Sufficient copies of the Submission Agreement and the Statement of Claim and supporting documents shall be provided to the Director of Arbitration for each party and the arbitrator.* The Statement of Claim shall specify the relevant facts, the remedies sought and whether or not a hearing is demanded.

(c) The claimant shall pay the sum of $15.00 if the amount in controversy is $1,000 or less, $25.00 if the amount in controversy is more than $1,000 but $2,500 or less, $100 if the amount in controversy is more than $2,500 but does not exceed $5,000, or $200 if the amount in controversy is more than $5,000 but does not exceed $10,000 upon filing

of the Submission Agreement. The final disposition of this sum shall be determined by the arbitrator.

(d) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

[The respondent(s) shall, within twenty (20) calendar days from receipt of service, file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of the Respondent's Answer, together with supporting documents.]

Within twenty (20) calendar days from receipt of the Statement of Claim, Respondent(s) shall serve each party with an executed Submission Agreement and a copy of Respondent's Answer. Respondent's executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient copies for the arbitrator(s) along with any deposit required under the schedule of fees. The Answer shall designate all available defenses to the Claim and may set forth any related Counterclaim and/or related Third Party Claim the Respondent(s) may have against the Claimant or any other person. If the Respondent(s) has interposed a Third Party Claim, [The Director of Arbitration shall endeavor to serve promptly by mail or otherwise a copy of same, together with a copy of the Submission Agreement on such Third Party who shall respond in the manner herein provided for response to the claim.] *the Respondent(s) shall serve the Third Party Respondent with an executed Submission Agreement, a copy of Respondent's Answer containing the Third Party Claim and a copy of the original Claim filed by the Claimant. The Third Party Respondent shall respond in the manner herein provided for response to the claim.* If the Respondent(s) files a related Counterclaim exceeding $10,000, the arbitrator may refer the Claim, Counterclaim and/or Third Party Claim if any, to a panel of three (3) or more arbitrators in

accordance with Rule 607 *of this Code* or, he may dismiss the Counterclaim and/or Third Party Claim, without prejudice to the Counterclaimant(s) and/or Third Party Claimant(s) pursuing the Counterclaim and/or Third Party Claim in a separate proceeding. *The costs to the Claimant under either proceeding shall in no event exceed $200.*

(e) [The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Claimant a copy of the Answer, Counterclaim, Third Party Claim or other responsive pleading, if any. The Claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either (i) file a Reply to any Counterclaim with the Director of Arbitration who will serve a copy of the Reply on the Respondent(s) or,] *All parties shall serve promptly by mail or otherwise on all other parties and the Director of Arbitration, with sufficient copies for the arbitrators, a copy of the Answer, Counterclaim, Third Party Claim or other responsive pleading, if any. The Claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either:*

(i) serve on each party a reply to any counterclaim, or

(ii) if the amount of the Counterclaim exceeds the Claim, have the right to file a statement withdrawing the Claim. If the Claimant withdraws the Claim, the proceedings will be discontinued without prejudice to the rights of the parties.

(f) The dispute, claim or controversy shall be submitted to a single arbitrator knowledgeable in the securities industry selected by the Director of Arbitration. Unless the public customer demands or consents to a hearing, or the arbitrator(s) calls a hearing, the arbitrator shall decide the dispute, claim or controversy solely upon the pleadings and evidence filed by the parties. If a hearing is necessary, such hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.

(g) The Director of Arbitration may grant extensions of time to file any pleading upon a showing of good cause.

(h) The arbitrator shall be authorized to require the submission of further documentary evidence as he, in his sole discretion deems advisable.

(i) Upon the request of the arbitrator, the Director of Arbitration shall appoint two (2) additional arbitrators to the panel which shall decide the matter in controversy.

(j) In any case where there is more than one (1) arbitrator, the majority will be public arbitrators.

(k) In his discretion, the arbitrator may, at the request of any party, permit such party to submit additional documentation relating to the pleadings.

(l) Except as otherwise provided herein, the general arbitration rules of the New York Stock Exchange, Inc. shall be applicable to proceedings instituted under this Code.

Rule 607. DESIGNATION OF NUMBER OF ARBITRATORS

(a) (1) In all arbitration matters involving public customers and non-members where the matter in controversy exceeds $10,000, or where the matter in controversy does not involve or disclose a money claim, the Director of Arbitration shall appoint an arbitration panel which shall consist of no less than three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(2) *An arbitrator will be deemed as being from the securities industry if he or she is:*

1. is a person associated with a member, or broker/dealer, government securities broker, government securities dealer or registered investment adviser, or

2. has been associated with any of the above within the past three (3) years, or

3. is retired from any of the above, or

4. is an attorney, accountant or other professional who devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two (2) years.

(3) *An arbitrator who is not from the securities industry shall be deemed a public arbitrator. A person will not be classified as a public arbitrator if he or she has a spouse or other member of the household who is a person associated with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer or investment adviser.*

(b) Composition of Panels

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

Rule 608. NOTICE OF SELECTION OF ARBITRATORS

The Director of Arbitration shall inform the parties of the names [and business affiliations of the arbitrators] *and employment histories of the arbitrators for the past ten years, as well as information disclosed pursuant to Rule 610* at least eight (8) business days prior to the date fixed for the initial hearing session. *A party may make further inquiry of the Director of Arbitration concerning an arbitrator's background. In the event that any arbitrator, after appointment and prior to the first hearing session, should resign, die, withdraw, be disqualified or otherwise be unable to perform as an arbitrator, the Director of Arbitration shall appoint a new member to the panel to fill any vacancy. The Director of Arbitration shall inform the parties of the name and employment history of the arbitrator for the past*

ten years, as well as information disclosed pursuant to Rule 610, as soon as possible. A party may make further inquiry of the Director of Arbitration concerning the background of any arbitrator and within the time remaining prior to the first hearing session or the five (5) day period provided under Rule 609, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Rule 609.

Rule 610. DISCLOSURES REQUIRED OF ARBITRATORS

(a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination.

[Prior to the commencement of the first hearing session the Director of Arbitration may remove an arbitrator who discloses such information.]

Each arbitrator shall disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationship involving members of their families or their current employers, partners or business associates.

(b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in Paragraph (a) above.

(c) The obligation to disclose interests, relationships, or circumstances which might preclude an arbitrator from rendering an objective and impartial determination described in subsection (a) hereof is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances which arise, or which are recalled or discovered.

(d) Prior to the commencement of the first hearing session, the Director of Arbitration may remove an arbitrator based on information disclosed pursuant to this section. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this section, if the arbitrator who disclosed the information is not removed.

Rule 611. DISQUALIFICATION OR OTHER DISABILITY OF ARBITRATORS

[In the event that any arbitrator, after the commencement of the first session but prior to the rendition of the award should become disqualified, resign, die, refuse or be unable to perform or discharge his duties, the Director of Arbitration, upon such proof as he deems satisfactory, shall, where permited by law, either (a) appoint a new member to the panel to replace such arbitrator, obtaining the consent of the parties; or (b) with the consent or waiver of the parties, direct that the arbitration proceed without the substitution of a new arbitrator.]

In the Event that any arbitrator, after the commencement of the first hearing sessions and prior to the rendition of the award, should resign, die, withdraw, be disqualified or otherwise be unable to perfo.m as an arbitrator, the remaining arbitrator(s) may continue with the hearing and determination of the controversy, unless such continuation is objected to by any party within five (5) days of notification of such resignation, death, withdrawal, disqualification, or other inability. Upon objection, the Director of Arbitration shall appoint a new member to the panel to fill any vacancy. The Director of Arbitration

shall inform the parties as soon as possible of the name and employment history for the past ten (10) years of the replacement arbitrator, as well as information disclosed pursuant to Rule 610. A party may make further inquiry of the Director of Arbitration concerning the replacement arbitrator's background and within the time remaining prior to the next scheduled hearing session or the five (5) day period provided under Rule 609, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Rule 609.

Rule 612. INITIATION OF PROCEEDINGS

Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:

(a) Statement of Claim

The Claimant shall file with the Director of Arbitration [three (3) executed copies of the Submission Agreement and three (3) copies of the Statement of Claim of the controversy in dispute, together with the documents in support of the claim.] *an executed Submission Agreement, a Statement of Claim and the required deposit. Sufficient copies of the Submission Agreement and the Statement of Claim and supporting documents shall be provided to the Director of Arbitration for each party and arbitrator(s).* The Statement of Claim shall specify the relevant facts and the remedies sought. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

(b) Service and Filing with the Director of Arbitration

For purposes of the Code of Arbitration Procedure, service may be effected by mail or other means of delivery. Service and filing are accomplished on the date of mailing with first-class postage pre-paid or, in the case of other means of service, on the date of delivery. Filing with the Director of Arbitration shall be made on the same date as service.

[(b)]*(c) Answers—Defenses, Counterclaims and/or Cross-Claims*

[(1) The Respondent(s) shall within twenty (20) business days from receipt of service file with the Director of Arbitration one (1) copy of the Respondent's(s') Answer.]

(1) Within twenty (20) business days from receipt of the Statement of Claim, the Respondent(s) shall serve each party with an executed Submission Agreement and a copy of Respondent(s) Answer. Respondent(s) executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient copies for the arbitrator(s), along with any deposit required under the schedule of fees. The Answer shall specify all available defenses and relevant facts that will be relied upon at the hearing and may set forth any related Counterclaim the Respondent(s) may have against the Claimant, [and any third party claim against any other party or person upon any existing dispute, claim or controversy to arbitration under this Code.] *any Cross-Claim, the Respondent(s) may have against any other named Respondent(s) and any Third Party Claim against any other party or person upon any existing dispute, claim or controversy subject to arbitration under this Code.*

(2) (i) A Respondent, Responding Claimant, Cross-Claimant, *Cross-Respondent* or Third Party Respondent who pleads only a general denial as an answer may, [upon written objection by the adversary party before the hearing to the Director of Arbitration] *upon objection by a party*, in the discretion of the arbitrators, be barred from presenting any fact or defenses at the time of the hearing.

(ii) A Respondent, Responding Claimant, Cross-Claimant, *Cross-Respondent* or Third Party

Respondent who fails to specify all available defenses and relevant facts in such party's answer may, upon objection by [the adversary] *a* party, in the discretion of the arbitrators, be barred from presenting such facts or defenses *not included in such party's answer* at the hearing.

(iii) A Respondent, Responding Claimant, Cross-Claimant, *Cross-Respondent* or Third Party Respondent who fails to file an answer within twenty (20) business days from receipt of service, or unless the time to answer has been extended pursuant to paragraph (5), may, in the discretion of the arbitrators, be barred from presenting any matter, arguments or defenses at the hearing.

(3) [If the Respondent(s) has interposed a third party claim the Director of Arbitration shall endeavor to serve promptly by mail or otherwise a copy of same together with a copy of the Submission Agreement on such third party who shall respond in the manner herein provided for response to the Claim.] *Respondent(s) shall serve each party with a copy of any Third Party Claim. The Third Party Claim shall also be filed with the Director of Arbitration with sufficient copies for the arbitrator(s), along with any deposit required under the schedule of fees. Third Party Respondent(s) shall respond in the manner provided for response to the Claim, as provided herein above.*

(4) [The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Claimant a copy of the Answer, Counterclaim, Third Party Claim or other responsive pleading, if any. The Claimant may within ten (10) business days file a Reply to the Counterclaim with the Director of Arbitration who will serve a copy of the Reply on the Respondent(s).] *The Claimant shall serve each party*

with a reply to a counterclaim within ten (10) business days of receipt of an answer containing a counterclaim. The reply shall also be filed with the Director of Arbitration with sufficient copies for the arbitrator(s).

(5) [The time period to file any pleading, whether such be denominated as a Claim, Answer, Counterclaim, Reply or Third Party pleading, may be extended for such further periods as may be granted by the Director of Arbitration.] *The Director of Arbitration may extend any time period in this section whether such be denominated as a Claim, Answer, Counterclaim, Cross-Claim, Reply or Third Party pleading.*

[(c)]*(d)* Joining and Consolidation—Multiple Parties.

(1) With respect to any dispute, claim or controversy submitted to arbitration, any party or person eligible to submit a claim under this Code shall have the right to proceed in the same arbitration against any other party or person upon any claim directly related to such dispute.

(2) For purposes of this subsection, the Director of Arbitration shall be authorized to determine preliminarily whether a claim is directly related to the matter in dispute and to join any other party to the dispute and to consolidate the matter for hearing and award purposes. In arbitrations where there are multiple Claimants, Respondents and/or Third Party Respondents, the Director of Arbitration shall be authorized to determine preliminarily whether such parties should proceed in the same or separate arbitrations.

(3) All final determinations with respect to joining, consolidation and multiple parties under this subsection shall be made by the arbitration panel.

Rule 619. GENERAL PROVISION GOVERNING PRE-HEARING PROCEEDING

(a) Requests for Documents and Information

The parties shall cooperate to the fullest extent practicable in the voluntary exchange of information to expedite the arbitration. Any request for documents or other information should be specific, relate to the matter in controversy, and afford the party to whom the request is made a reasonable period of time to respond without interfering with the time set for the hearing.

(b) Document Production and Information Exchange

(1) Any party may serve a written request for information or documents ("information request") upon another party twenty (20) business days or more after service of the Statement of Claim by the Director of Arbitration or upon filing of the Answer, whichever is earlier. The requesting party shall serve the information request on all parties and file a copy with the Director of Arbitration. The parties shall endeavor to resolve disputes regarding an information request. Such efforts shall be set forth in the objection.

(2) Unless a greater time is allowed by the requesting party, information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service. Any objection to an information request shall be served by the objecting party on all parties and filed with the Director of Arbitration.

(3) Any response to objections to information requests shall be served on all parties and filed with the Director of Arbitration within ten (10) calendar days of receipt of the objection.

(4) Upon the written request of a party whose information request is unsatisfied, the matter will be referred by the Director of Arbitration to either a pre-hearing conference under paragraph (d) of this section or to a

selected arbitrator under paragraph (e) of this section.

(c) Pre-Hearing Exchange

At least ten (10) calendar days prior to the first scheduled hearing date, all parties shall serve on each other copies of documents in their possession and shall identify witnesses they intend to present at the hearing. The arbitrator(s) may exclude from the arbitration, any documents not exchanged or witnesses not identified. This paragraph does not require service of copies of documents or identification of witnesses which parties may use for cross-examination or rebuttal.

(d) Pre-Hearing Conference

(1) Upon the written request of a party, an arbitrator, or at the discretion of the Director of Arbitration, a pre-hearing conference shall be scheduled. The Director of Arbitration shall set the time and place of a pre-hearing conference and appoint a person to preside. The pre-hearing conference may be held by telephone. The presiding person shall seek to achieve agreement among the parties on any issues that relate to the pre-hearing process or to the hearing, including but not limited to, the exchange of information, exchange or production of documents, identification of witnesses, identification and exchange of hearing documents, stipulations of facts, identification and briefing of contested issues, and any other matters which will expedite the arbitration proceedings.

(2) Any issues raised at the pre-hearing conference that are not resolved may be referred by the Director of Arbitration to a single member of the Arbitration Panel for decision.

(e) Decisions by Selected Arbitrator

The Director of Arbitration may appoint a single member of the Arbitration Panel to decide all unresolved

issues referred to under this section and sections (f) and (g). Such arbitrator shall be authorized to act on behalf of the panel to issue subpoenas, direct appearances and production of documents, and set deadlines. Decisions under this paragraph shall be made upon the papers submitted by the parties, unless the arbitrator calls a hearing. The arbitrator may elect to refer any issue under this paragraph to the full panel.

(f) Subpoenas

The arbitrator(s) and any counsel of record to the proceedings shall have the power of the subpoena process as provided by law. *All parties shall be given a copy of the subpoena upon its issuance.* [However] The parties shall produce witnesses and present proofs to the fullest extent possible without resort to the [issuance of the] subpoena process.

[(b) Prior to the first hearing session, the parties shall cooperate in the voluntary exchange of such documents and information as will serve to expedite the arbitration. If the parties agree, they may also submit additional documents to the Director of Arbitration for forwarding to the arbitrators.]

(g) Power to Director Appearance and Production of Documents

The arbitrator(s) shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member or member organization of the New York Stock Exchange, Inc. and/or the production of any records in the possession or control of such persons or members. Unless the arbitrator(s) direct otherwise, the party requesting the appearance of a person or the production of documents under this section shall bear all reasonable costs of such appearance and/or production

Rule 623. RECORD OF PROCEEDINGS

[Unless requested by the arbitrators or a party or parties to a dispute, no record of any arbitration proceeding is required to be kept. If a record is kept, it shall be a verbatim record.] *A verbatim record by stenographic reporter or tape recording of all arbitration hearings shall be kept.* If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request *unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed. If the record is transcribed at the request of any party, a copy shall be provided to the arbitrators.*

Rule 627. AWARDS

(a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as it is required by law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.

(c) The Director of Arbitration shall endeavor to serve a copy of the award: (i) by registered or certified mail upon all parties or their counsel, at the address of record; or (ii) by personally serving the award upon the parties; or (iii) by filing or delivering the award in such a manner as may be authorized by law.

(d) The arbitrator(s) shall endeavor to render an award within thirty (30) business days from the date the record is closed.

(e) The award shall contain the names of the parties, a summary of the issues in controversy, the damages and/or other relief requested, the damages and/or other relief awarded, a statement of any other issues resolved, the

names of the arbitrators and the signatures of the arbitrators concurring in the award.

(f) Summary information contained in the awards shall be made publicly available in accordance with the policies of the sponsoring self-regulatory organization.

Rule 629. SCHEDULE OF FEES *FOR CUSTOMER DISPUTES*

(a) At the time of filing a [Submission Agreement, a Claimant] *Claim, Counterclaim, Third-Party Claim or Cross-Claim, a party* shall deposit with the Exchange the amount indicated below unless such deposit is specifically waived by the Director or Arbitration

Amount in Dispute (Exclusive of interest and expenses)	Deposit
$1,000 or less	$ 15
Above $1,000 but not exceeding $2,500	$ 25
Above $2,500 but not exceeding $5,000	$ 100
Above $5,000 but not exceeding $10,000	$ 200
Above $10,000 but not exceeding $50,000	$ 400
Above $50,000 but not exceeding $100,000	$ 500
Above $100,000 but not exceeding $500,000	$ 750
Above $500,000	$1,000

Where the amount in dispute is $10,000 or less, no additional deposits shall be required despite the number of *hearing* sessions. Where the amount in dispute is above $10,000 and multiple *hearing* sessions are required, the arbitrators may require any of the parties to make additional deposits for each additional *hearing* session. In no event shall the aggregate amount deposited per *hearing* session exceed the amount of the initial deposit(s) as set forth in the above schedule.

(b) *A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference, which lasts four (4) hours or less.*

[(b)]*(c)* The arbitrators, in their awards, may determine the amount chargeable to the parties as forum fees (fees) and shall determine by whom such fees shall be borne. Where the amount in dispute is $10,000 or less, total [forum] fees chargeable to the parties shall not exceed the amount *of the total initial deposit* deposited *by the parties, regardless of the number of hearing sessions conducted. Where the amount in dispute is above $10,000, total fees chargeable to the parties per hearing session may equal but shall not exceed the amount of the total initial deposit(s) deposited by the parties.* [Where the amount in dispute is above $10,000 but does not exceed $50,000, the maximum fee shall be $400 per session. Where the amount in dispute is above $50,000 but does not exceed $100,000, the maximum fee shall be $500 per session. Where the amount in dispute is above $100,000, the maximum fee shall be $750 per session. Where the amount in dispute is above $500,000, the maximum fee shall be $1,000 per session.] Amounts deposited by a party shall be applied against fees, if any. If the fees are not assessed against a party who had made a deposit, the deposit will be refunded. *In addition to forum fees, the arbitrator(s) may determine in their awards the amount of costs incurred pursuant to Rules 617, 619 and 624; and unless applicable law directs otherwise, other costs and expenses of the parties and arbitrator(s) which are within the scope of the agreement of the parties. The arbitrator(s) shall determine by whom such costs shall be borne.*

[(c)]*(d)* If the dispute, Claim or controversy does not involve or disclose a money Claim, the amount to be deposited by the Claimant shall be [$100] *$200*, or such amount as the Director of Arbitration or the panel of arbitrators may require, but shall not exceed $1,000.

[(d)]*(e)* Any matter submitted and thereafter settled or withdrawn prior to the commencement of the first *hearing* session shall entitle the parties to a refund of all but $100 of the amount deposited with the Association. This sec-

tion shall not apply to claims filed under Section 2 of this Code.

[(e)]*(f)* Any matter submitted and thereafter settled or withdrawn subsequent to the commencement of the first *hearing* sessions may be subject to such refund of assessed deposits, if any, as the panel of arbitrators presiding may determine.

[(f)]*(g)* The arbitrators may assess forum fees and *costs incurred pursuant to* Rules 617, 619 and 624 [Rule 620 costs] in any matter settled or withdrawn subsequent to the commencement of the first session.

(h) The fee for pre-hearing conferences shall be 75 per cent of the fees contained in subsection (a).

[Rule 620. POWER TO DIRECT APPEARANCES

The arbitrators shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member or member organization of the New York Stock Exchange, Inc. and/or the production of any records in the possession or control of such persons, members or member organizations. Unless the arbitrators direct otherwise, the party requesting the appearance of a person or the production of documents under this section shall bear all reasonable costs of such appearance and/or production.]

Succeeding rules will be renumbered.

[Rule 638. EXCHANGE OF DOCUMENTS

At least ten days prior to the date assigned for a hearing, the parties shall exchange documents in their possession which they intend to introduce to the arbitrators. The arbitrators may exclude from the arbitration any document not so exchanged.]

Rule 637. REQUIREMENTS WHEN USING PRE-DISPUTE ARBITRATION AGREEMENTS WITH CUSTOMERS

(1) Any pre-dispute arbitration clause shall be highlighted and shall be immediately preceded by the following disclosure language which shall also be highlighted:

(a) Arbitration is final and binding on the parties.

(b) The parties are waiving their right to seek remedies in court, including the right to jury trial.

(c) Pre-arbitration discovery is generally more limited than and different from court proceedings.

(d) The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

(e) The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

(2) Immediately preceding the signature line, there shall be a statement that the agreement contains a pre-dispute arbitration clause.

(3) A copy of the agreement containing any such clause shall be given to the customer who shall acknowledge receipt thereof on the agreement or on a separate document.

(4) No agreement shall include any condition which limits or contradicts the rules of any self-regulatory organization or limits the ability of a party to file any claim in arbitration or limits the ability of the arbitrators to make any award.

(5) The requirements of this section shall apply only to new agreements signed by an existing or new customer of a member or member organization after _____.

NEW YORK STOCK EXCHANGE, INC.

GUIDELINES FOR CLASSIFICATION OF ARBITRATORS

In order to insure continued investor confidence in the arbitration process, the New York Stock Exchange has adopted the following policies with regard to the classification of securities industry and public arbitrators and to the exercise of challenges for cause:

1. Individuals with close securities industry ties such as attorneys, accountants or other professionals who routinely represent industry firms or individuals, will either be reclassified as industry arbitrators or not be used.
2. Individuals who have spent a substantial part of their business careers in the securities industry shall always be classified as industry arbitrators.
3. Individuals who have spent a relatively minor portion of their career in the securities industry shall not be classified as public arbitrators until at least five (5) years have elapsed from the date of their last industry affiliation. All such past affiliations shall be disclosed and challenges for cause based upon such past affiliations shall be sustained.
4. Close family relationships with broker/dealers shall be disclosed and challenges for cause based on such relationships shall be honored.
5. Attorneys, accountants and other professionals whose firms have close securities industry ties will still be classified as public arbitrators provided the attorney or other professional does not routinely represent industry firms or individuals. Challenges for cause based on such industry ties will be honored.
6. All arbitrators shall read and become familiar with the Code of Ethics for Arbitrators developed by the American Bar Association and the American Arbitration Association.

7. Any close question on arbitrator classification or on challenges for cause shall be decided in favor of public customers.
8. Spouses of securities industry personnel may not serve as arbitrators.

THESE GUIDELINES WILL BE USED BY THE NEW YORK STOCK EXCHANGE IN APPLYING RULE 607.

APPENDIX B

SURVEY TAKEN BY DELOITTE HASKINS & SELLS AT THE REQUEST OF THE NEW YORK STOCK EXCHANGE, INC., OF ARBITRATION AND LITIGATION RESULTS OF CUSTOMER DISPUTES WITH SIX BROKERAGE FIRMS

Deloitte Haskins & Sells

One World Trade Center
New York, New York 10048-0601
(212) 669-5000
International & Domestic Telex
4995706

New York Stock Exchange
11 Wall Street
New York, New York 10005

Attention: Mr. James E. Buck
Senior Vice President and Secretary

Dear Sir:

We have performed the procedures requested by you, as described below, with respect to certain customer originated cases which were terminated either by arbitration, litigation or settlement, as shown in Exhibit A. The procedures that we performed are summarized as follows:

1. We prepared a questionnaire to obtain data from various securities brokerage firms (Exhibit B)
2. We selected six securities brokerage firms with large retail brokerage business and distributed the questionnaires. The six firms were Dean Witter Reynolds Inc., Merrill Lynch, Pierce, Fenner & Smith Inc., Paine Webber Inc., Piper, Jaffray & Hopwood Inc., Shearson Lehman Hutton Inc., and Smith Barney, Harris Upham & Co. Inc.
3. We obtained responses from the firms regarding all cases terminated during a recent three month period. The period

selected was the most recent period for which the firms could obtain data. Such periods were between October 1, 1987 and June 30, 1988.

4. We accumulated the data and prepared Exhibit A based upon the responses received.

Because the information was obtained from securities brokerage firms and was not subjected to procedures in accordance with generally accepted auditing standards, we are not in a position to express an opinion on the data obtained from the firms. However, in our opinion, Exhibit A summarizes fairly the data obtained.

Yours truly,

/s/

DELOITTE HASKINS & SELLS

Exhibit A
Summary of Data Obtained
(dollar amounts shown in thousands)

	Litigated (1)	Arbitrated	Litigation Transferred to Arbitration	All Arbitration
Number of Cases	66	142	35	177
%	27.16%	58.44%	14.40%	72.84%
Average Elapsed Time (days)	599	434	1,056	557
Original Claim:				
Compensatory	8,826	$10,768	$10,333	$21,101
Punitive/Treble	55,075	10,013	10,643	20,656
Total	63,901	20,781	20,976	41,757
Payments: (2)				
Compensatory	1,659	4,057	2,114	6,171
Punitive/Treble	0	10	1	11
Total	1,659	4,067	2,115	6,182
Legal Costs:				
Outside Attorneys	1,018	498	1,392	1,890
Internal Allocations	303	671	348	1,019
Total	1,321	1,169	1,740	2,909
Average Original Claim	968	146	599	236
Average Payment	25	29	60	35
Average Legal Costs	20	8	50	16
Payments as % of Original Claim	2.60%	19.57%	10.08%	14.81%
Legal Costs as % of Payments	79.66%	28.75%	82.75%	47.06%

See Notes to Exhibit A

Notes to Exhibit A

1. One isolated case was omitted because it was considered to bias the remainder of the sample. The impact of this case is as follows (dollar amounts shown in thousands):

	Individual Case	Litigated Totals If Included
Average Elapsed Time (days)	926	604
Original Claim:		
Compensatory	$ 15,000	$ 23,826
Punitive/Treble	100,000	155,075
Total	115,000	178,901
Payments:		
Compensatory	200	1,859
Punitive/Treble	0	0
Total	200	1,859
Legal Costs:		
Outside Attorneys	348	1,366
Internal Allocations	6	309
Total	354	1,675
Average Original Claim	-	2,670
Average Payment	-	28
Average Legal Costs	-	25
Payments as % of Original Claim	.17%	1.04%
Legal Costs as % of Payments	177.00%	90.10%
How Concluded	Settlement	-

2. Total Payments may be categorized as follows (in thousands):

	Litigation	Arbitrated	Litigated Transferred to Arbitration	All Arbitrated
Judgments	$ 174	-	-	-
Arbitration Awards	-	$2,226	$1,317	$3,543
Settlements	1,485	1,841	798	2,639
Total	$1,659	$4,067	$2,115	$6,182

Exhibit B

NEW YORK STOCK EXCHANGE

Case Questionnaire

The New York Stock Exchange is preparing to respond to the Securities and Exchange Commission's request to study arbitration. To assist the Exchange in its preparation please provide the information requested below for certain public customer originated cases. The information should be given for each matter of dispute which was terminated either by arbitration, litigation or settlement during a selected three month period. The period may be selected by you but it should be a recent period. The matter of dispute should be given an identifying number. The names of parties to the dispute need not be given.

1. Case number _____
2. Arbitrated ☐ Litigated ☐ Litigated/Arbitrated ☐
3. If arbitrated:

   NYSE ☐
   NASD ☐
   AAA ☐
   Other _____

4. If litigated please give court or jurisdiction _____
5. Date of original claim _____
6. Amount of original claim:

   Compensatory _____
   Punitive/Treble _____

7. Date matter was concluded _____
8. How concluded:

   Arbitration Award ☐
   Judgment ☐
   Settlement ☐
   Other _____

9. Amount of Award, Judgment or Settlement:

   Compensatory _____

   Punitive/Treble _____

10. Costs of processing the dispute:

   A. Fees of outside counsel _____

   B. Allocated cost of internal legal department _____

Please send the completed information for your firm to Deloitte Haskins & Sells, One World Trade Center, New York, New York 10048-0601, Attention of Edward Lill no later than **September 23, 1988**. For questions relating to your response please call Edward Lill at Deloitte Haskins & Sells (212) 669-5083.